CAPITAL CASE

JUN 26 2007

EXECUTION DATE

(8)

NO. 06-1209

IN THE SUPREME COURT OF THE UNITED STATES

JOHN W. HIGHTOWER,

Petitioner,

v.

WILLIAM TERRY, Warden,

Respondent.

SUPPLEMENTAL RESPONSE IN OPPOSITION TO PETIIONER'S MOTION FOR A STAY OF EXECUTION PENDING RESOLUTION OF HIS PETITION FOR REHEARING, AS SUPPLEMENTED

SUSAN V. BOLEYN
Senior Assistant Attorney General
Counsel of Record for Respondent

THURBERT E. BAKER
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

Please serve:

SUSAN V. BOLEYN
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3397

FILED

JUN 25 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPPLEMENTAL RESPONSE IN OPPOSITION TO PETIIONER'S MOTION FOR A STAY OF EXECUTION

Comes now, Respondent, William Terry, former Warden of the Georgia Diagnostic and Classification Prison, by and through counsel, Thurbert E. Baker, Attorney General of the State of Georgiā, and files this supplemental response in opposition to Petitioner's motion for a stay of execution pending resolution of his supplemental petition for rehearing from denial of writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, by showing and stating the following:

THIS COURT SHOULD DENY PETITIONER'S MOTION FOR A STAY OF EXECUTION BASED ON PETITIONER'S SUPPLEMENT TO HIS PENDING PETITION FOR REHEARING.

On May 14, 2007, this Court denied Petitioner's petition for a writ of certiorari seeking review of the decision of the Eleventh Circuit Court of Appeals rejecting Petitioner's claim based on this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986), as reviewed in light of this Court's decision in Miller-El v. Dretke, 545 U.S. 231 (2005).

This Court had previously remanded Petitioner's case to the Eleventh Circuit Court of Appeals for further consideration of Petitioner's Batson claim in light of this Court's decision in Miller-El v. Dretke, 545 U.S. 231 (2005). The petition for a writ of certiorari sought review of the Eleventh Circuit's reinstatement of its previous decision rejecting Petitioner's Batson claim. Hightower v. Terry, 459 F.3d 1067, 1069 (11th Cir. 2006).

Petitioner now asks this Court to grant a stay of execution and his petition for rehearing, by citing this Court's order, issued today, granting certiorari in Snyder v. Louisiana,[1] in which the Petitioner sought review of the decision of the Supreme Court of Louisiana, including that portion of the Court's decision rejecting Petitioner Snyder's Batson claim.

This Court remanded Snyder v. Louisiana to the Louisiana Supreme Court for reconsideration of Snyder's Batson claim in light of Miller-El v. Dretke, 545 U.S. 231 (2005), just as this Court remanded Petitioner Hightower's Batson claim to the Eleventh Circuit Court of Appeals in light of Miller-El v. Dretke. See State of Louisiana v. Snyder, 942 So. 2d 484, 486 (2006), finding that, "[c]urrently, the case is on remand from the United States Supreme Court, which directed that we again review defendant's Batson claims, this time in light of Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). After reviewing defendant's Batson complaints cumulatively in light of the entire record as directed by Miller-El, we find the trial court did not err in determining the venirepersons were not excused by the State in a racially discriminatory manner. Therefore, for the reasons that follow, the judgment affirming defendant's conviction and sentence is

[1] See Snyder, Allen V. Louisiana, Case No. 06-10119, "The Motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted."

reinstated." Compare Hightower v. Terry, 459 F.3d 1067, 1069 (11th Cir. 2006), concluding that, "The Court granted Hightower's petition, vacated our judgment, and remanded the case "for further consideration in light of" Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). Hightower v. Schofield, 545 U.S. 1124, 125 S. Ct. 2929, 2929-30, 162 L. Ed. 2d 863 (2005). We conclude that Miller-El does not counsel a decision contrary the one we reached in Hightower v. Schofield, and therefore adhere to that decision."

The fact that this Court denied certiorari as to the Eleventh Circuit's decision affirming the denial of federal habeas corpus relief to Petitioner on a Batson claim, viewed in light of Miller-El,[2] while granting certiorari to review a different set of specific circumstances before the Supreme Court of Louisiana in reviewing Petitioner Snyder's Batson claim in light of Miller-El, does not warrant the granting of Petitioner's motion for a stay of execution, nor his petition for rehearing. Both cases were remanded by this Court pursuant to Miller-El and both cases were pending before this Court at the same time on petitions for a writ of certiorari. Therefore, when this Court denied certiorari in the instant case, it had before it for

[2] The Eleventh Circuit's fact-specific application of Batson, in light of Miller-El, is reflected in the Eleventh Circuit's opinion stating, "We have considered Miller-El in the context of the instant case. We conclude that it does not change our disposition of Hightower's Batson claim. Our opinion in Hightower v. Schofield is accordingly reinstated." Hightower v. Terry, 459 F.3d 1067, 1072 (11th Cir. 2006).

review the specific circumstances of both cases and the subsequent granting of certiorari in Snyder does now warrant a re-examination of the fact-specific application of Batson and Miller-El which was made in Petitioner Hightower's case nor warrant a stay of execution of Petitioner's case pending the resolution of another petitioner's Batson claim based on the individual circumstances of Petitioner's case.

As is apparent, the decision in Snyder is procedurally distinguishable from the facts of this case, as Snyder sought review of a decision of the Louisiana Supreme Court, whereas Petitioner Hightower seeks review of a decision of the Eleventh Circuit affirming the denial of federal habeas corpus relief to Petitioner on a Batson claim.[3]

The granting of certiorari review by this Court in Snyder v. Louisiana, as to a fact-specific application of Batson, does not warrant the granting of Petitioner's petition for rehearing from the denial of certiorari as to Petitioner's Batson claim.

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[3] Illustrative of the numerous differences in the underlying facts of Petitioner's Batson claim and that of Petitioner Snyder, is that Petitioner Snyder was tried by an all white jury, whereas there were 9 Caucasian and 3 African-American members on Petitioner Hightower's jury. See Snyder v. Louisiana, 942 So. 2d 484, 486 (2006). Also absent from the record in Petitioner's case is any "highly probative evidence of discriminatory intent" which is alleged to be present in Snyder.

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Respondent prays that this Court deny Petitioner's motion for stay of execution, based on Petitioner's supplemental petition for rehearing, as no stay of execution is warranted to allow this Court to consider Petitioner's petition for rehearing from the denial of a petition for a writ of certiorari seeking review of a Batson claim.

Respectfully submitted,

THURBERT BAKER 033887
Attorney General

MARY BETH WESTMORELAND 750150
Deputy Attorney General

SUSAN V. BOLEYN 065850
Senior Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
Senior Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3397

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Response in Opposition to Motion for Stay of Execution, by sending a copy thereof by facsimile:

Mark E. Olive
c/o Jeff Ertel
Federal Defender Program, Inc.
Suite 1700
100 Peachtree Street, N.W.
Atlanta, Georgia 30303

This 25th day of June, 2007.

SUSAN V. BOLEYN
Senior Assistant Attorney General